

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARLOS TOVAR MENDOZA,

Petitioner,

v.

CIV 05-1303 BB/CEG

ANTHONY ROMERO, Director,
Regional Correctional Center, et al.,

Respondents.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

This matter is before the Court on Carlos Tovar Mendoza's: (i) *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254, (ii) "exhibit list," (iii) "statement," (iv) memorandum and affidavit detailing his claims, (v) fifth motion for appointment of counsel, (vi) motion for copies, (vii) motion for leave to invoke provisions of the Federal Rules of Civil Procedure ("FRCP"), and (vii) motion for appointment of an interpreter.¹ *See Docs. 1, 19, 23, 25-30.* In addition, Respondents have filed their Answer, a motion to dismiss, and the Record Proper from the state proceedings. *See Docs. 11, 13, and Record Proper.*² All of the issues can be resolved on the record and, therefore, an evidentiary hearing is unnecessary. *E.g., Trice v. Ward*, 196 F.3d 1151, 1159 (10th Cir. 1999), *cert. denied*, 531 U.S. 835 (2000); *Rule 8(a), Rules Governing*

¹ Throughout the record, Mr. Mendoza is referred to as "Tovar," and I do the same here.

² All citations to "Exhibits" are those attached to Respondents' Answer, which was docketed as Document 13. Citations to the Record Proper are to the bates-stamped numbers, unless otherwise noted. Citations to the transcripts from the state proceedings are referred to as "Plea Transcript" or "Sentencing Transcript."

Office Action Summary	Application No.	Applicant(s)
	09/939,932	RUSSELL, GARY
	Examiner James A. Thompson	Art Unit 2625

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 14 December 2006.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) _____ is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-5,7-27,30,33-37,39-48 and 50-75 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 27 August 2001 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application
Paper No(s)/Mail Date _____	6) <input type="checkbox"/> Other: _____

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 14 December 2006 have been fully considered but they are not persuasive. Firstly, although Applicant has amended each of the claims rejected under 35 USC §101 in the previous office action, mailed 14 June 2006, all of said previously rejected claims are again rejected below under 35 USC §101. A more detailed explanation based on the present amendments to the claims is set forth below for each claim presently rejected under 35 USC §101.

Secondly, with respect to the rejections under 35 USC §112, first paragraph, only claims 26 and 68-70 have been amended such that the rejections under 35 USC §112, first paragraph set forth in said previous office action have been overcome. A more detailed explanation based on the present amendments to the claims is set forth below for each claim presently rejected under 35 USC §112, first paragraph.

Additionally, with respect to the rejections under 35 USC §112, second paragraph set forth in said previous office action, Applicant's present amendments have overcome the rejections under 35 USC §112, second paragraph set forth in said previous office action. Therefore, said rejections have been withdrawn.

Finally, with respect to the prior art rejections, claim 1 has been amended as discussed in the Interview of 11 December 2006. The remaining independent claims have been amended differently than claim 1, and do not necessarily require that the first dot and second dot be intentionally overlapped. Applicant is respectfully reminded that, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification (see MPEP §2111). New grounds of rejection are given for some of the claims. Said new grounds of rejection have been necessitated by the present amendments to the claims.

Claim Rejections - 35 USC § 101

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

3. **Claim 26 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.** Claim 26 recites an apparatus comprising a halftone screen, and no other element. Thus, claim 26 is a halftone screen. The halftone screen recited in claim 26 is simply a

collection of data, and as such is not a process, machine, article of manufacture, or composition of matter. Even though said halftone screen is embodied on a tangible recording medium, said halftone screen is still simply a collection of data, whether recorded on a computer disk or printed on paper. Mere collections of facts and/or data are not within one of the statutory classes of a process, machine, article of manufacture, or composition of matter. Therefore, claim 26 is not eligible for patent protection.

4. Claim 27 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Claim 27 recites a program product. There is no recitation with respect to the physical embodiment of said program product. As such, claim 27 merely recites a program *per se*, and not any kind of process, machine, article of manufacture, or composition of matter. While the program product is embodied on a tangible, recordable medium, said medium could be paper on which the program is written or a computer disc with uncompiled code written in a high-level language. Claim 27 is not necessarily a computer program encoded on a computer-readable medium. Thus, claim 27 is not eligible for patent protection.

5. Claim 30 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Claim 30 recites a program product. There is no recitation with respect to the physical embodiment of said program product. As such, claim 30 merely recites a program *per se*, and not any kind of process, machine, article of manufacture, or composition of matter. While the program product is embodied on a tangible, recordable medium, said medium could be paper on which the program is written or a computer disc with uncompiled code written in a high-level language. Claim 30 is not necessarily a computer program encoded on a computer-readable medium. Thus, claim 30 is not eligible for patent protection.

6. Claims 48 and 61 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Claims 48 and 61 recite a program product. There is no recitation with respect to the physical embodiment of said program product. As such, claims 48 and 61 merely recite a program *per se*, and not any kind of process, machine, article of manufacture, or composition of matter. While the program product is embodied on a tangible, recordable medium, said medium could be paper on which the program is written or a computer disc with uncompiled code written in a high-level language. Claims 48 and 61 are not necessarily a computer program encoded on a computer-readable medium. Thus, claims 48 and 61 are not eligible for patent protection.

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7. **Claims 68-70 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.** Claims 68-70 recite an apparatus comprising a threshold array, and a tangible, recordable medium bearing said threshold array. The threshold arrays recited in claims 68-70 are simply data structures recorded on some tangible medium, which could be data printed on paper, data recorded on a computer disc, or data recorded on some other tangible medium. However, recorded data is still simply a collection of data; and as such is not a process, machine, article of manufacture, or composition of matter. Therefore, claims 68-70 are not eligible for patent protection.

8. **Claim 75 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.** Claim 75 recites a program product. There is no recitation with respect to the physical embodiment of said program product. As such, claim 75 merely recites a program *per se*, and not any kind of process, machine, article of manufacture, or composition of matter. While the program product is embodied on a tangible, recordable medium, said medium could be paper on which the program is written or a computer disc with uncompiled code written in a high-level language. Claim 75 is not necessarily a computer program encoded on a computer-readable medium. Thus, claim 75 is not eligible for patent protection.

Claim Rejections - 35 USC § 112

9. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

10. **Claims 14-19 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement.** The claims contain subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claims 14-19 simply recite a printing plate and describe features of said printing plate. Claims 14-19 do not recite any component parts of said printing plate. Thus, claims 14-19 are single means claims (see MPEP §2164.08(a)) and are therefore rejected under 35 USC §112, 1st paragraph as having undue breadth.

11. **Claims 20-25 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement.** The claims contain subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claims 20-25 simply recite a printing plate and describe features of said printing plate. Claims 20-25 do not recite any component parts of said printing plate. Thus, claims 20-25 are single means claims (see MPEP §2164.08(a)) and are therefore rejected under 35 USC §112, 1st paragraph as having undue breadth.

12. **Claims 39-41, 44, 55-59 and 67 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement.** The claims contain subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claims 39-41, 44, 55-59 and 67 simply recite a printing plate and describe features of said printing plate. Claims 39-41, 44, 55-59 and 67 do not recite any component parts of said printing plate. Thus, claims 39-41, 44, 55-59 and 67 are single means claims (see MPEP §2164.08(a)) and are therefore rejected under 35 USC §112, 1st paragraph as having undue breadth.

13. The following is a quotation of the second paragraph of 35 U.S.C. 112:
The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

14. **Claim 62 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.** Claim 62, as presently recited, is clearly incomplete due to a clerical oversight. Since the “wherein” clause is incomplete and thus incomprehensible, Examiner will ignore the “wherein” clause for the purpose of examining claim 62 with respect to the prior art.

Claim Rejections - 35 USC § 102

15. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2003). Thus, I conclude the deferential standards apply to all the claims before me.

The phrase “clearly established federal law, as determined by the Supreme Court of the United States” in § 2254(d)(1) “refers to the holdings, as opposed to the dicta” of the Supreme Court that set forth “the governing legal principle or principles . . . at the time the state court renders its decision.” *Yarborough v. Alvarado*, 541 U.S. 652, 660-661 (2004) (internal quotations and citations omitted). “A state-court decision is contrary to [the Supreme] Court’s clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result.” *Brown v. Payton*, 544 U.S. 133, 141 (2005) (internal citations omitted).

A state decision is not deemed “contrary to” just because it fails to cite Supreme Court opinions, is unaware of Supreme Court precedent, or fails to address a claim or provide any reasoning for its decision. Rather, the focus is whether the reasoning or the result of the state court decision is either contrary to established precedent as defined above, or an unreasonable application thereof. *E.g., Mitchell*, 540 U.S. at 16; *Early*, 537 U.S. at 8; *Saiz*, 392 F.3d at 1176; *Gipson*, 376 F.3d at 1196-97.

“A state-court decision involves an unreasonable application of this Court’s clearly established precedents if the state court applies this Court’s precedents to the facts in an objectively unreasonable manner.” *Brown*, 544 U.S. at 141. However, “it is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court” applied “clearly established federal law erroneously or incorrectly.” *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal quotations and citations omitted). “Rather, that

application must be objectively unreasonable.” *Id.* at 76.⁸

Under § 2254(d)(2), a state decision rests on an “unreasonable determination of the facts” where Petitioner shows by “clear and convincing evidence” that the factual finding is erroneous. Otherwise, the factual findings are presumed correct. *E.g., Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); 28 U.S.C. § 2254(e)(2).

If application of the above AEDPA standards does not foreclose further review and discussion by the federal court, habeas relief nonetheless cannot issue absent a finding of a constitutional violation sufficient to warrant such relief.⁹

III. Claims Regarding the Plea

Nolo contendere pleas in New Mexico amount to a confession of guilt and have the same legal consequences as a guilty plea. *See Thomas v. Kerby*, 44 F.3d 884, n.4 (10th Cir. 1995); *State v. Ball*, 718 P.2d 686, 693 (1986); *see also Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1219-1220 (10th Cir. 2000). Accordingly, for the purposes of these proceedings, I will

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The term ‘unreasonable’ is ‘a common term in the legal world and, accordingly, federal judges are familiar with its meaning.’ . . . At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough, 541 U.S. at 664.

⁹ *See, e.g., Turrentine v. Mullin*, 390 F.3d 1181, 1189-90 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2544 (2005); *Brown v. Uphoff*, 381 F.3d 1219, 1225 (10th Cir. 2004), *cert. denied sub nom*, 125 S. Ct. 940 (2005); *Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir.), *cert. denied*, 539 U.S. 960 (2003); *Herrera v. Lemaster*, 301 F.3d 1192, 1199 (10th Cir. 2002), *cert. denied*, 537 U.S. 1197 (2003).

treat petitioner's *nolo contendere* plea the same as a guilty plea. "A valid guilty plea may not be obtained through coercion." *Osborn v. Shillinger*, 997 F.2d 1324, 1327 (10th Cir.1993) (citations omitted). However, the U.S. Supreme Court's longstanding test for determining the validity of a petitioner's plea is simply "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."¹⁰ *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

Contrary to what he alleges in his federal petition, Tovar *was* provided an interpreter, both at the plea hearing and the sentencing hearing. *See Doc. 1* at 5; *Plea Transcript* at 2; *Sentencing Transcript* at 2. Also contrary to what alleges in his federal petition, Tovar's plea agreement was interpreted for him. *Plea Transcript* at 10. Thus, the primary underlying premise for his involuntary and unknowing plea claim, being a Spanish-speaker and a foreigner, utterly fails. *See U.S. v. Avila-Sandoval*, 65 Fed. Appx. 227, 230 (10th Cir. 2003) ("To the extent Mr. Avila-Sandoval claims confusion based on his ability to speak only Spanish, we find such an argument wanting. The record clearly indicates Mr. Avila-Sandoval was provided with an interpreter throughout the process, the plea agreement was translated into Spanish, and his trial counsel at the change-of-plea hearing spoke Spanish.").

The plea agreement that Tovar signed before the plea hearing states that he could spend up to thirty years in prison. *Ex. B* at 3. It contains an admission of identity as to Tovar's prior federal felony drug charge. *Id.* at 2. Just above Tovar's signature, the agreement states, "I have read and understand this agreement . . . I agree to enter my plea, and I admit that I am the person

¹⁰ Post AEDPA, voluntariness is a question of law. *See Rodriguez v. Soares*, 28 Fed. Appx. 896, 899 (10th Cir. 2001); *see also Laycock v. New Mexico*, 880 F.2d 1184, 1186 (10th Cir.1989). However, under either analysis, Tovar is not entitled to § 2254 relief.

previously convicted of felonies as indicated above and according to the terms and conditions set forth in this agreement.” *Id.* at 5. The agreement also states that Tovar waived his right to an appeal. *Id.* at 4.

At the plea hearing, Judge Murdoch reiterated each of the terms of the plea. *See Plea Transcript* at 7-8. He told Tovar that “the bottom line is, I can sentence you anywhere from 0 to 30 years in prison.” *Id.* at 4. Tovar, with the help of an interpreter, stated that he understood, that no one had promised him anything that was not contained in the plea agreement, that no one had forced him to enter the plea, that he was entering the plea under his own free will, and that he was satisfied that the agreement was in his best interests. *Id.* at 4, 8-10.

“Solemn declarations in open court carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Lasiter v. Thomas* 89 F.3d 699, 703 (10th Cir. 1996). The record, as shown above, contains numerous declarations by Tovar in open court and clearly reflects that Tovar understood the consequences of his plea. As such, any argument by Tovar that he did not understand the consequences of his plea because no such plea existed in his native country is not grounds for finding that the plea was unknowing.

Likewise, Ayala’s alleged promise that he could deliver a sentence of three years and for Tovar to “go along with the plea” is not grounds for finding that the plea was involuntary. Tovar signed a plea agreement which stated that he faced a maximum sentence of thirty years, the trial court reiterated this information to Tovar before he entered his plea, and he solemnly indicated that he understood. Erroneous plea predictions by attorneys in similar circumstances have not rendered the plea involuntary as a matter of law. *See States v. Silva*, 430 F.3d 1096, 1100 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 2318 (2006); *United States v. Reyes Pena*, 216 F.3d 1204,

1212 (10th Cir. 2000). Furthermore, an attorney's attempt "to persuade Petitioner that it was in his best interest to plea does not lead to the conclusion that his no contest plea was involuntary." *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995), *cert. denied*, 516 U.S. 1062 (1996). Even when a defendant is "hounded, browbeaten" and cursed at by counsel to enter a plea, statements of voluntariness made in court control. *U.S. v. Carr*, 80 F.3d 413, 417 (10th Cir. 1996).

Even assuming, for the purposes of argument, that Ayala's conduct with regard to the plea was "ineffective," Tovar would not be entitled to habeas relief because, as discussed in more detail below, the inquiry is two-pronged and he utterly fails to establish prejudice. The Tenth Circuit has so held in an almost identical habeas case involving a claim that Ayala's ineffectiveness in promising a particular sentence rendered a plea involuntary. *See Berry-Gurule v. Lucero*, 215 F.3d 1336, 2000 WL 725479 * 3 (unpublished table decision) (10th Cir. 2000) ("We cannot grant Berry-Gurule habeas relief in this case because she has failed to meet the second part of the *Strickland* test by alleging facts that show prejudice.").

Consequently, I cannot conclude that the trial court's conclusion that the plea was knowing and voluntary was "contrary to" or "unreasonable" under the applicable AEDPA standards.

IV. Ineffective Assistance Of Counsel

Ineffective assistance of counsel is a mixed question of law and fact under the AEDPA standards. *See Battenfield v. Gibson*, 236 F.3d 1215, 1236 (10th Cir. 2001). Here, the state court decision does not discuss the ineffective assistance of counsel claim on the merits, however, the decision is still entitled to deference under the AEDPA standard of review. *E.g., Griffin*, 179 Fed. Appx. at 559; *Aycox*, 196 F.3d at 1177; *Hine*, 318 F.3d at 160-161. To establish ineffective

assistance of counsel, a habeas petitioner must satisfy a two-part test. First, he must show that counsel's performance fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Judicial scrutiny of counsel's performance is highly deferential; thus, the petitioner must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* at 689. To be constitutionally ineffective, counsel's conduct "must have been completely unreasonable, not merely wrong." *Moore v. Gibson*, 195 F.3d 1152, 1178 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2206 (2000); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1152 (10th Cir. 1999). Second, the petitioner must show he has been prejudiced; that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. "In the guilty plea context, to establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, the defendant would have insisted upon going to trial." *Silva*, 430 F.3d at 1099. Conclusory assertions are insufficient to establish ineffective assistance. *See United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994). Because this test is two pronged, if either prong is not met, it is unnecessary to discuss the other. *E.g., Hill*, 474 U.S. at 60.

A. Resolution of the Federal Charge

Tovar's allegation that his counsel was ineffective because he did not make arrangements for a concurrent resolution of his federal charge is without merit. Counsel cannot be deemed ineffective for failing to raise a meritless issue. *E.g., United States v. Dixon*, 1 F.3d 1080, n.5 (10th Cir. 1993), *abrogated on other grounds by Florida v. White*, 526 U.S. 559 (1999). "A state is not responsible for what might occur in federal criminal proceedings." *Montoya v.*

Johnson, 226 F.3d 399, 405 (5th Cir. 2000). “The discretion of a federal sentencing court cannot be limited by a state court’s judgment.” *Id.* at 406; *see also United States v. Adair*, 826 F.2d 1040, 1041 (11th Cir.1987).

The record clearly shows that at the time of state court sentencing, the petition for revocation of federal supervised release was still pending. Even presuming that the state court could legally arrange for a joint resolution, it could not do so because the federal proceedings were not over. All this aside, however, Tovar cannot satisfy the prejudice prong in *Strickland* because the federal court gave Tovar exactly what he was seeking: a concurrent resolution. *See Doc. 155 of CR 99-690, Violation of Supervision Proceedings Minute Sheet* (“Notes: Ms. Converse requests sentence to run concurrent with State sentence;” sentence imposed was four months--concurrent to state sentence).

B. Failure to Investigate and Introduce “Exculpatory” Evidence at the Sentencing Hearing

Tovar’s argument that his counsel was ineffective for failing to investigate and present certain items of evidence at sentencing also fails. Tovar thought that because on occasions he resumed living with his ex-wife and had intercourse, and because they were assisting each other financially, that he could not be guilty of “rape,” and that his ex-wife simply fabricated the claims for vindictive reasons. *Doc 1.* at 7; *Ex. B, C, D; Sentencing Transcript* at 12-13. He made these things known to Ayala, wanted Ayala to “investigate” them and introduce them in mitigation at sentencing to contradict his ex-wife’s testimony about being battered, raped, and kidnapped.¹¹ *Id.*

¹¹ Police discovered Tovar’s ex-wife, Lillian, because of call from a friend who was concerned about her well-being. The friend led police to Tovar’s car, which had blood on the inside of it. The police discovered Lillian in Tovar’s apartment. She had been severely battered and was immediately sent to the hospital. *See Police Report, Doc. 19*, at 8. At sentencing, Lillian testified that Tovar:

“[C]ame inside [the car] and started hitting me, hitting me, hitting me.

Tovar must overcome the presumption that a challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 689. It is reasonable for counsel to curtail an investigation if available information indicates that further inquiries would be fruitless. *See Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *see also Petsche v. Tafoya*, 146 Fed. Appx. 306, 311 (10th Cir. 2005). “A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* at 521-522.

Joint economic activity, a cell phone record showing that Tovar called his daughter during the kidnapping, and family affidavits stating that Tovar’s ex-wife had tendencies to fabricate or exaggerate do not conclusively demonstrate that Tovar did not batter, rape, or kidnap his ex-wife.¹² There was certainly evidence to the contrary; Tovar had a history of battering her. *See Sentencing Transcript* at 6, 8. In not “investigating” and presenting certain items of evidence at sentencing, counsel’s strategy is evident. Rather than attacking the credibility of a sympathetic

Afterwards, he started the car and, on the way to – I don’t even know where he took me, he punched me and he said to me that he was going to kill me. And he was hitting me and hitting me. He told me to start praying because that night I was going to die.”

Sentencing Transcript at 3.

¹² More specifically, the evidence provided by Tovar in support of his ineffectiveness claim included: 1) a 16 minute long conversation with the couple’s daughter during the middle of the alleged kidnapping incident (supported by cell phone records), 2) statements that his ex-wife sought him out in the months she was supposedly avoiding him and being stalked (supported by family affidavits and an unsworn/unauthenticated family friend memorandum), 3) joint economic activity during the period of the alleged stalking (supported by video rental account, checks for car repair, cell phone bills, and checks for cable television installation), 4) statements that Tovar would frequently spend the night at his ex-wife’s home (supported by family affidavits and an unsworn/unauthenticated family friend memorandum), 5) statements that the ex-wife had a motive to fabricate (supported by an unsworn/unauthenticated family friend memorandum), 6) statements that after the second incident, the ex-wife and the children did not attend counseling (supported by an unsworn/unauthenticated family friend memorandum). *Doc 1.* at 7; *Ex. B, C, D.*

victim and taking an approach at sentencing that the Tovars were resuming family life so there could be no rape, Tovar's counsel relied on an objective medical evaluation on the date of the incident which indicated that a severe battering took place. *See Doc. 19* at 11-12. Tovar's counsel chose, instead, to present testimony at sentencing regarding a diagnostic evaluation and from Tovar's mother. *See Sentencing Transcript* at 8-12.

Repentance born of a failed strategy does not raise a genuine issue of ineffectiveness, particularly where, as here, Tovar's interpretation of the law influenced Judge Murdoch's decision in sentencing. *E.g., Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005); *Rogers v. U.S.*, 91 F.3d 1388, 1392 (10th Cir. 1996). At the sentencing hearing, Tovar, through his interpreter, told Judge Murdoch:

THE DEFENDANT: I would like to say that there's confusion with all of this that is happening. She [Lillian] is contradicting herself with some of the things she says My children saw me sleeping in the house for three days, and the neighbor, so it's not possible that I raped her, because previously we had a relationship together. What happened was there was a friend in my apartment—

THE COURT: *Wait, wait, wait. You think if you had a prior relationship with her you couldn't rape her?*

THE DEFENDANT: Yes. Before that, she would be willing to be together with me and have relationship, two --the two of us.

Id. at 12-13 (emphasis added).

Tovar fails to establish his counsel was ineffective and does not even make the assertion that but for Ayala's failures he would have gone to trial instead of entering a plea. *See Silva*, 430 F.3d at 1099; *Hill*, 474 U.S. at 59; *Taylor*, 454 F.3d 1075, 1080 (10th Cir. 2006). He fails on

both prongs of the *Strickland* test, whether my review is *de novo* or concentrating on whether the state decision was “contrary” or “unreasonable.”

V. Fifth Motion for Appointment of Counsel

Tovar has requested that the Court appoint him counsel. See *Doc. 25-27*. As explained to Tovar previously, he has no right to appointed counsel. *See Clark v. Tansy*, 13 F.3d 1407, 1410 (10th Cir. 1993); *Carter v. Montgomery*, 769 F.2d 1537, 1543 (11th Cir. 1985). Ordinarily, there is no reason to appoint counsel unless the case has reached the stage of proceedings where an evidentiary hearing is required. *See e.g., United States v. Leopard*, 170 F.3d 1013, 1015 (10th Cir. 1999); *Swazo v. Wyoming Dept. of Corrections*, 23 F.3d 332, 333 (10th Cir. 1994). I have indicated above that an evidentiary hearing is not required. Thus, Tovar’s fifth motion for appointment of counsel should be denied.

VI. Motion for Copies

Tovar has also requested that he be provided with copies of all documents that have been filed with the Court. Tovar claims that all documents were inadvertently lost. *See Doc. 28*. In light of the significant amount of filings in this case, copying all documents that have been filed with this Court would impose a “significant and unjustified burden and expense on the court.” *Lyons v. McGinnis*, 2006 WL 1720383 at *2 (W.D.N.Y. 2006); *see also Negron v. Adams*, 229 F.3d 1164, 2000 WL 1152554 at *3 (unpublished table decision) (10th Cir. 2000). As such, the Court will provide Tovar only with copies of documents that he needs to file his objections. Accordingly, by copy of this Proposed Findings and Recommended Disposition, Tovar is being provided with the following documents (*Docs. 1, 11, 12, 13, 15, 18, 24*), as well as a copy of the current docket sheet. He may review the docket sheet and request copies of particular documents

upon a showing that the requested documents are necessary for the filing of his objections.

VII. Motion For Leave to Invoke Provisions of the FRCP and

Motion for an Interpreter

In his motion for leave, Tovar asks the Court to invoke FED. R. CIV. P. 12, 43(f), and all other rules pertaining to discovery. *See Doc. 30.* In support, Tovar states that he needs an interpreter to aid him in filing pleadings and interpreting orders, that he foresees the need for discovery, and that he foresees the need for implementing Rule 12 in response to Respondents' Answer and motion to dismiss. *Id.* Rule 11 of the Rules Governing Section 2254 Cases states: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." As explained above, I am recommending that these proceedings be dismissed. Therefore, discovery need not be taken and FED. R. CIV. P. 12 need not be invoked. As explained below, FED. R. CIV. P. 43(f) need not be invoked either. As such, I recommend that the motion for leave to invoke the provisions of the FRCP be denied.

Tovar also moves this Court to appoint an interpreter to act as his legal aid in translating things filed of record and in preparing future pleadings. *See Doc. 29.* In support of the motion for an interpreter, Tovar cites FED. R. CIV. P. 43(f), which discusses the appointment of an interpreter for the purpose of taking testimony in open court. Clearly, that rule does not apply. Besides 43(f), Tovar cites no other authority and the Court has found none to support his motion. As such, I recommend that the motion for an interpreter be denied.

Wherefore,

IT IS HEREBY RECOMMENDED THAT:

1. Respondents' motion to dismiss (*Doc. 11*) be granted;
2. Petitioner's fifth motion for appointment of counsel (*Doc. 25*) be denied;
3. Petitioner's motion for copies (*Doc. 28*) be granted in part and denied in part;
4. Petitioner's motion for leave to invoke provisions of the FRCP (*Doc. 30*) be denied;
5. Petitioner's motion for an interpreter (*Doc. 29*) be denied; and
6. The § 2254 petition be dismissed with prejudice.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636 (b)(1). **A party must file any objections with the Clerk of the District Court within the ten day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**



UNITED STATES MAGISTRATE JUDGE